



Availability of Funds and Collection of Checks Request for Comments

Docket No. R-1564

Submitted by

J. Steven Stone on behalf of United Bankshares, Inc.

steve.stone@bankwithunited.com

304-720-4510

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With dual headquarters in Washington, D.C. and Charleston, WV, United Bankshares, Inc. (UBSI), is a \$19.3 billion regional bank holding company. UBSI is the parent company of its two banking franchises: United Bank, with locations in Washington, D.C., Virginia, and Montgomery County, Maryland, and United Bank, Inc., with locations in West Virginia, Pennsylvania, Ohio and Hagerstown, MD. United Bankshares stock has been publicly traded since 1987 on the NASDAQ National Market System under the quotation symbol "UBSI."

UBSI appreciates the opportunity to respond to the Federal Reserve's Request for Comments on its proposed modifications to Regulation CC. To that end, we offer the following responses to the questions posed in the RFC. Please direct any questions to the submitter.

...the Board is proposing to adopt a presumption of alteration with respect to any dispute arising under federal or state law as to whether the dollar amount or the payee on a substitute check or electronic check has been altered or whether the substitute check or electronic check is derived from an original check that is a forgery. The Board requests comment on whether the presumption should also apply to a claim that the date was altered.

UBSI supports the Board's proposal of a presumption of alteration with respect to any dispute involving the payee or dollar amount of a substitute check or electronic check. A claim of date alteration, however, is a special circumstance. There are two scenarios in which a date alteration claim seems most likely to apply: (1) a situation in which a check was deemed non-negotiable because it was stale or post-dated or (2) a situation in which the payer wanted to negate a properly payable item. These warrant separate consideration.

While check dates are not generally enforceable under the Uniform Commercial Code (per §4-401 and §4-404), there are depository banks that might refuse to accept a check that is obviously stale or post-dated. In such a case, the depositor/payee may be tempted to alter the date to circumvent controls at the Bank of First Deposit (BoFD).

There is also the potential for a dispute to take place between the payor and the payee after a payment has been made. The opportunity to claim that the date of a check had been altered may provide an

avenue for the payor to recoup funds that would not otherwise be easily recoverable, and the check return process is not an appropriate mechanism for solving a problem that should be handled outside the payment system.

In both situations, that answer would seem to be in the hands of the paying bank to corroborate the claim. The checks with adjacent check numbers would typically be written immediately before and immediately after the disputed item and can be used to establish boundaries within which the disputed check was likely written. If the disputed date is outside those parameters, the paying bank may make a claim of alteration on behalf of its customer. If the date of the disputed item is within the parameters established by the checks written before and after it, or if a reasonable date range cannot otherwise be established and substantiated, the paying bank should not file an alteration claim.

Under the proposed rule, the presumption of alteration may be overcome by a preponderance of evidence that the substitute check or electronic check accurately represents the dollar amount and payee as authorized by the drawer, or that the substitute check or electronic check is derived from an original check that is a forgery. The proposed rule would also state that the presumption of alteration shall cease to apply if the original check is made available for examination by all parties involved in the dispute. The Board requests comment on whether the presumption of alteration should apply if the bank claiming the presumption received and destroyed the original check.

While UBSI generally supports the concept of a presumption of alteration, we have some questions about the method by which the presumption is made and potentially overcome by “a preponderance of the evidence.”

1. If there is a presumption of alteration, is an affidavit from the maker of the disputed check still required, and if so, would it differ in any meaningful way from an affidavit being used today?
2. The proposed rule says that the presumption of alteration may be overcome if the original item is made available to the paying bank, but there are no time limits within which the original must be provided before that defense is forfeited. If a significant amount of time passes before the original is presented, alternatives that might have been available to the paying bank to mitigate the loss from a check then determined to be fraudulent may have been eliminated or undermined. For that reason, UBSI would like to see a reasonable standard (e.g., ten business days following the alteration claim) established for the presentation of the original item to avoid unnecessarily prolonging the settlement of a dispute.

It is worth noting that there may be an important interaction between the proposed changes to Regulation CC, UCC §4-406 and each bank’s account agreement. UCC §4-406 generally caps the maximum allowable time for an alteration claim against the paying bank at one year (§4-406(f)) although many banks have shortened that period by agreement – often to sixty days. UCC §4-406(c) states that a “customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration...” in this context, do the changes to Regulation CC contemplate a time limit by which the paying bank must make a claim against the BoFD, and is that limit linked to the time allowed for a claim

under the paying bank's account agreement or is it the one year limit set in §4-406(f)? This has implications beyond the banking system since a meaningful percentage of check images are now captured by businesses and consumers via remote deposit with the original checks never being handled by a bank. Financial Institutions looking to take full advantage of the "original check" defense will have to not only adjust their own physical check retention periods, they will have to educate consumers and businesses on the importance of retaining original checks and providing them on demand if needed to settle a dispute. Retaining original checks for up to a year could necessitate changes to agreements with consumers and businesses using remote deposit and has additional ramifications for check storage and security for all parties in the payment process.

3. Who/What determines if there is a "preponderance of evidence" sufficient to overcome the presumption of alteration – the Federal Reserve, a court of competent jurisdiction, an arbitrator? If the assumption here is that the parties to the dispute will be able to readily agree among themselves on whether an alteration has occurred, that may not be realistic. UBSI recommends that the Federal Reserve consider outlining an adjudication process as one will surely be needed at some point.

With respect to the request for comment on the implications of an original check that has been lost or destroyed by the party claiming the presumption, UBSI's position varies based on the point in the process at which the original check was lost/destroyed. If the original is lost/destroyed by the paying bank prior to the completion of the adjudication process, the paying bank should forfeit its presumption of alteration although other avenues of recovery, including litigation and arbitration, would still be available. If the original is lost/destroyed by the paying bank after the claim has been settled, its continued relevance is a function of the finality of that settlement. If there is no appeal process, loss of the original check is immaterial. If there is a mechanism to appeal the assignment of loss, the relevance of the original check would be a function of that appeal process.

Thank you for this opportunity to comment.



J. Steven Stone
Executive Vice President
United Bank, Inc.